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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN R. CAMUS,

Defendant and Appellant.

F062961

(Super. Ct. No. 11CM8505)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Levy, J. and Poochigian, J.

Appellant, Steven R. Camus, was convicted by a jury of possession of a controlled substance in prison (Pen. Code, § 4573.6). Following the jury trial, Camus admitted the prior strike allegation and a prior prison term allegation. Camus was sentenced to the upper term of four years, doubled to eight years for the prior strike conviction, plus one year for the prior prison term, for a total of nine years in prison. Camus contends there was no substantial evidence showing he possessed heroin, and the trial court violated the dual use prohibition in sentencing. We will affirm.

FACTS

On April 24, 2010, Salvador Ochoa, a correctional officer at Avenal State Prison, and his partner, Robert Buttal, prepared to conduct random locker searches in housing unit 450, which contained 24 dorms. Each dorm houses 12 to 14 inmates and contains their beds and lockers. As Ochoa walked towards dormitory four, he saw Camus walking away from it. Ochoa testified that Camus was walking “pretty fast to get out of the way when he saw us coming.” Camus was not housed in dormitory four. Inmates were not supposed to visit other dormitories, but the correctional officers tolerated inmates’ movement from one dormitory to another.

As he and Buttal approached, Ochoa ordered Camus back into dormitory four. Ochoa estimated there were five or six inmates present in the dormitory. He stated that he told Camus he wanted to search him and that Camus seemed nervous and walked toward the bed area in the back of the dormitory. Then Ochoa ordered Camus back to the front so he could search him first. Ochoa testified that as Camus walked back towards the front of the dormitory, near the row of lockers, he noticed that Camus had his left fist closed. Camus then reached his left arm out to the side of one of the lockers and, as he started to take off his shoe, put his left hand behind the locker. As Camus put his hand behind the locker, Ochoa asked Camus what he had dropped, to which Camus did not reply. Ochoa did not see Camus’s fist open, and did not see an item drop. When he received no response, Ochoa looked on the side of the locker and saw a latex bindle.

Then he placed Camus in restraints, and Officer George Kidd subsequently took Camus to the program office.

At the program office, Amy Franco, a licensed vocational nurse, performed a medical examination of Camus. Franco noticed puncture wounds on his left arm. She testified that it was possible that any kind of needle entered into his skin, but could not say if it was a blood draw or a needle mark from something else. Following the medical examination, Kidd asked Camus to provide a urine sample, to which Camus refused.

The bindle contained 0.44 grams of heroin. Mike Jeske, a correctional officer with the investigative services unit, processed the bindle, tested it for narcotics, and sent the contents to the Department of Justice lab for confirmatory testing. Jeske also testified that it was uncommon for inmates to leave drugs lying around in a housing unit.

DISCUSSION

I. THERE WAS SUFFICIENT EVIDENCE SUPPORTING THE CONVICTION

Camus asserts the evidence was insufficient to sustain the conviction of possession of heroin in prison. In particular, he claims there was no substantial evidence showing he possessed the heroin. We disagree.

Challenges to a judgment based on insufficient evidence are reviewed under well-established rules. We must “review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence ... such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*)). We must affirm even if the circumstances and evidence would support a contrary finding, and the “standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.” (*Ibid.*) *Rodriguez* explained:

““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the [jury’s] findings, the opinion of the reviewing court that the circumstances might

also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]””” (*Rodriguez*, at p. 11.)

The elements of possession of a controlled substance include (1) a specific controlled substance, in a sufficient quantity and in a usable form; (2) possession, which may be actual or constructive, exclusive or joint; and (3) knowledge of the fact of possession and of the illegal character of the substance. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175.) Each of the elements may be proved by circumstantial evidence and any reasonable inferences drawn from such evidence. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 956.) “Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction.” (*People v. Redrick* (1961) 55 Cal.2d 282, 290.) Here, Camus argues there is insufficient evidence showing he constructively possessed the heroin.

Camus contends he did not have constructive possession of the heroin because he did not have dominion and control over dormitory four. He correctly states that mere opportunity of access to a place where narcotics are found does not constitute possession. (*People v. Tripp, supra*, 151 Cal.App.4th at p. 956; *People v. Vasquez* (1969) 1 Cal.App.3d 769, 777.) Camus cites a series of cases in which the finding of dominion and control over narcotics hinged on whether the defendant lived in or owned the premises where the narcotics were found. (See *People v. Busch* (2010) 187 Cal.App.4th 150, 162 [possession of marijuana supported by sufficient evidence where marijuana was found in center console, immediately accessible to defendant, and defendant was owner and driver of truck]; *People v. Stanford* (1959) 176 Cal.App.2d 388, 391 [evidence of possession of cocaine and heroin held insufficient where narcotics found in bathroom where defendant was present, but defendant did not live at the house]; *People v. Glass* (1975) 44 Cal.App.3d 772, 775-778 (*Glass*) [possession of amphetamine not upheld where amphetamine found under couch on which the defendant was ordered to sit, and

defendant did not reside at the residence].) He argues that, because he did not live in dormitory four and did not have control of the premises, his proximity to the place where the heroin was found does not establish possession.

However, this court explained in *Glass*, “[A]n opportunity of access to a place where narcotics were found ..., *without more*, is insufficient to support a finding of unlawful possession.” (*Glass, supra*, 44 Cal.App.3d at p. 777, italics added.) Here, there is more evidence supporting a finding of constructive possession than Camus’s mere proximity to the heroin found.

Ochoa testified that Camus appeared nervous and that it appeared as if he was trying to “get out of the way when he saw us coming.” Further, Ochoa stated that Camus had his left fist closed as he came to the front of the dorm to be searched, which he then moved out of view, behind a locker. After Camus did not respond to Ochoa’s question asking him what he had dropped, Ochoa went over to the locker and discovered a bindle containing 0.44 grams of heroin behind it. Later, a nurse conducted a medical examination of Camus and discovered apparent puncture wounds. Camus also refused to provide a urine sample. The evidence of puncture wounds, the nervousness that Ochoa testified to, the refusal to provide a urine sample, the closed fist, and its removal from sight are all links in a chain that could lead a trier of fact to reasonably conclude that Camus dropped the bindle that Ochoa discovered and, thus, possessed the heroin.

Camus also contends that the absence of evidence showing the bindle was there only after he placed his hand behind the locker is a crucial link missing from the chain. Camus argues that the evidence is insufficient because of the possibility that the bindle was already on the floor behind the locker before he entered dorm four. However, Jeske testified that it would be uncommon for inmates to leave drugs lying around. Camus ignores the standard of review, which requires us to review the evidence in the light most favorable to the judgment, drawing all inferences the jury reasonably could have drawn from the evidence. (*Rodriguez, supra*, 20 Cal.4th at p. 11.) The jury could have taken Jeske’s testimony that it would be uncommon for inmates to leave drugs lying around to

reasonably infer that the bindle was not present on the floor behind the locker before Camus put his fist behind it. Thus, there is sufficient evidence supporting the jury's finding that Camus dropped the bindle behind the locker and possessed the heroin.

II. THE TRIAL COURT'S RELIANCE ON DUAL USE OF FACTS WAS HARMLESS ERROR

Camus also claims that even if substantial evidence supported the conviction, the court violated the dual use prohibition by using the facts of his prior convictions and prior prison term to select the upper term and to enhance the sentence. We disagree.

Penal Code section 1170, subdivision (b) provides, in relevant part, that "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

At sentencing, the trial court selected the upper term of four years, which doubled to eight years under the three strikes law, for Camus's prior strike conviction, and then a one-year sentence enhancement for his prior prison term. The court, in choosing the upper term, based its decision on Camus's prior convictions of increasing seriousness, his unsatisfactory performance on probation and parole, and his prior prison term.

Camus argues that the trial court erred in its sentencing decision because it used the fact of his prior prison term as both an aggravating factor to select the upper term and to impose the one-year enhancement. He relies on *People v. McFearson* (2008) 168 Cal.App.4th 388, 395, in which we held the court could not use a prior conviction to impose an aggravated sentence and also use the prison term served for that conviction to enhance the sentence.

But here, in contrast to *People v. McFearson*, the trial court did not rely on any single fact to impose the upper term. The trial court cited numerous aggravating factors, including Camus's numerous prior convictions of increasing seriousness, his unsatisfactory prior performance on probation and parole, and his prior prison term. There were numerous convictions apart from those that led to prison terms. While Camus is correct in arguing that the trial court erred in using his prior prison term as an

aggravating factor in imposing the upper term as well as the one-year enhancement, the court's error was harmless. As respondent notes, a sentencing court's decision will be reversed "only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Jones* (2009) 178 Cal.App.4th 853, 861.)

The trial court did make improper dual use of the prior prison term, but it is not reasonably probable the trial court would have imposed a lesser sentence had it been aware of this. Only a single aggravating factor is necessary to support an upper term sentence. (*People v. Jones, supra*, 178 Cal.App.4th at p. 863, fn. 7.) While the prior prison term may be eliminated from the trial court's list of aggravating factors, the prior convictions of increasing seriousness and Camus's unsatisfactory prior performance on probation and parole remain valid support for imposing the upper term. Further, the trial court did not find any mitigating circumstances. Given the trial court's explanation of other, valid, aggravating factors and the lack of any mitigating circumstances, we will not disturb the trial court's sentencing decision.

DISPOSITION

The judgment is affirmed.